

EXHIBIT O

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

IRVING H. PICARD, TRUSTEE FOR
THE LIQUIDATION OF B
v.

CASE NO. 14-01840-smb
CHAPTER 11

CASE NO. 08-99000-smb

SUSANNE STONE MARSHALL, ET AL

- - - - - x

SECURITIES INVESTOR PROTECTION
CORPORATION

ADMINISTRATIVE CASE NO.
08-1789

- - - - - x

U.S. Bankruptcy Court
One Bowling Green
New York, New York

May 7, 2014
10:03 AM

B E F O R E :

HON. STUART M. BERNSTEIN
U.S. BANKRUPTCY JUDGE

ECRO: MATTHEW

1 HEARING Re Motion for Preliminary Injunction/Memorandum of
2 Law in Support of Trustees Application for Enforcement of
3 Permanent Injunction and Automatic Stay (Adv. Pro No. 14-
4 01840)(related document(s)5808)'

5
6 HEARING Re Motion to Dismiss Trustee's Complaint as to
7 Defendants Marshall, Fox, Peshkin and Oasis

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25 Transcribed by: Sheila Orms

1 A P P E A R A N C E S :

2 BAKER HOSTETLER

3 Attorneys for SIPA Trustee

4 45 Rockefeller Plaza

5 New York, NY 10111

6

7 BY: KEITH R. MURPHY, ESQ.

8

9 BECKER & POLIAKOFF

10 Attorneys for Fox plaintiffs

11 45 Broadway

12 8th Floor

13 New York, NY 10006

14

15 BY: PETER W. SMITH, ESQ.

16

17 SCHULTE ROTH & ZABEL, LLP

18 Attorneys for Picower Parties

19 919 Third Avenue

20 New York, NY 10022

21

22 BY: MARCY RESSLER HARRIS, ESQ.

23 MICHAEL KWON, ESQ.

24

25

1 ATTORNEY AT LAW

2 Attorneys for Goldman plaintiffs

3 123 Australian Avenue

4 Palm Beach, FL 33480

5
6 BY: RICHAD LEE STONE, ESQ.

1 P R O C E E D I N G S

2 THE COURT: Be seated. Madoff.

3 (Pause)

4 MR. MURPHY: Good morning, Your Honor, Keith
5 Murphy, Baker & Hostetler for the trustee, Your Honor.

6 We're here on the trustee's application this
7 morning --

8 THE COURT: Let me just get the other appearances.

9 MR. SMITH: Of course.

10 MR. STONE: Richard Stone for the Goldman
11 plaintiffs.

12 MR. SMITH: Peter Smith of Becker & Poliakoff for
13 the Fox plaintiffs.

14 THE COURT: Okay. Thank you. Go ahead.

15 MR. MURPHY: Thank you, Your Honor. This morning
16 we're here on the trustee's application to enforce the
17 permanent injunction entered by the bankruptcy court on
18 January 13th, 2011 and the automatic stay in these
19 proceedings, Your Honor, and to otherwise enjoin the Fox
20 plaintiffs and the Goldman plaintiffs and anyone acting on
21 their behalf from proceeding with their putative class
22 actions against the Picower defendants or any other actions
23 against the counter defendants without further leave of this
24 Court.

25 Last week, Your Honor, we were before you in

1 connection with the Fox plaintiffs' motion to stay. And
2 during that hearing, the Court asked what interest does the
3 estate have in this matter, and why shouldn't this go
4 forward in Florida. And I answered it at that time, I
5 answered it with respect to what the trustee's interests are
6 and the estate's interest, as well as we believe this
7 Court's interests are, but I'd like to just highlight some
8 of that again.

9 The injunction against duplicative and derivative
10 claims, Your Honor, was a bargained for element of the
11 immense settlement that we entered into with Picard. And
12 that permanent injunction has to have a meaning that's
13 uniform in order to be -- to have a meaning.

14 The fraudulent transfer claims here that were
15 settled with the Picower defendants are the estate claims,
16 but the class action plaintiffs here are seeking to usurp
17 those claims and to utilize them for themselves.

18 The Court's power, Your Honor, to enjoin
19 duplicative and derivative claims has to have teeth. The
20 challenge that's presented here by the class action
21 plaintiffs complaints affects the ability -- the trustee's
22 ability to promise finality when the defendants settles
23 claims with the trustee, and it affects this Court's power
24 to grant that finality.

25 And it has effects clearly obviously just beyond

1 this case. It has to do with other bankruptcy cases as
2 well, when a permanent injunction is entered.

3 The other issue is that what claims belong to the
4 trustee, and what claims belong to other people is clearly
5 an issue that continues to be a live and litigated issue in
6 this case, Your Honor. And therefore addressing it here,
7 protects the integrity of the entire BLMIS liquidation
8 proceeding before the Court, from the net equity decision to
9 the claims process to the avoidance and settlement process
10 to the permanent injunction itself.

11 All of these are integral and essential to these
12 proceedings. I know that Judge Koeltl also had found that
13 the injunction of derivative claims protects the integrity
14 of the SIPA proceeding.

15 We can't allow -- the trustee can't allow others
16 to use the estate's claims to get more money from the
17 Picowers for the benefit of the same customers who are
18 already before this proceeding and addressed by the
19 trustee's activities, Your Honor.

20 The net equity decision that was entered here
21 provided the parameters, Your Honor, they are not entitled
22 to their fictitious profits. But the class action
23 plaintiffs in multiple attempts have tried to circumvent or
24 supplement their recovery beyond the net equity decision by
25 trying to sue the Picowers.

1 They're essentially trying to create a shadow
2 estate of all the customers that are represented by the
3 trustee. For example, the Fox second amended complaint
4 seeks damages in the approximate amount of \$64.8 billion,
5 which actually coincides with what the last statements were
6 in December of 2008.

7 Why do we care, Your Honor? We care because the
8 customers are usurping the estate's claims here. They're
9 helping themselves to a separate recovery of claims that
10 were settled. And absent the estate abandoning those
11 claims, they remain claims of the estate to bring and to
12 resolve, and it's inappropriate for others to take those
13 claims.

14 The Shadow estate is clearly an affront to the
15 Court's jurisdiction and is appropriate for this Court to
16 address it. And the other point I would add, Your Honor, is
17 that a defendant, once they settle with the trustee, should
18 take comfort in the fact that they're not going to be sued
19 on the same claims multiple times by the same parties.

20 And furthermore, Your Honor, the fact that these
21 claims as we see them are duplicative and derivative. Based
22 on the analysis of the claims, they have not set -- the
23 class action plaintiffs have not set forth any non-
24 conclusory particularized and non-derivative claims.

25 THE COURT: Let me ask you a question on that. Am

1 I supposed to decide, for example, whether the complaints
2 state a claim for control personal liability? In other
3 words, should I look this as a 12(b)(6) motion?

4 MR. MURPHY: No, Your Honor, you should not look
5 at it that way.

6 THE COURT: So what am I supposed to decide?

7 MR. MURPHY: We're not asking the Court to look at
8 this and make determinations as to whether they're
9 securities claims or not, or whether they've adequately
10 stated securities claims. What we're asking the Court, is
11 to review these claims as we have, and determine that once
12 you look behind the façade, that they are actually
13 duplicative and derivative of the trustee's fraudulent
14 conveyance claims.

15 THE COURT: But we know that the same actions can
16 give rise to direct and derivative claims. So how do I
17 avoid looking at the complaints to determine whether or not
18 they've asserted direct claims?

19 MR. MURPHY: I think --

20 THE COURT: Let me give you a for instance, and
21 I'm not saying these are facts, this is a hypothetical.

22 But suppose the allegation is that Picower induced
23 Madoff to send Picower's account statements out to everybody
24 to induce them to either join the fund, or join BLMIS, or to
25 continue to keep their money there. Those claims would be

1 based upon the withdrawals by Picower. But wouldn't those
2 also state a claim for securities fraud and maybe aiding and
3 abetting a securities fraud, maybe a control person claim?

4 MR. MURPHY: I think, Your Honor, you have to look
5 at it from the perspective of what's alleged and what facts
6 are presented in this particular instance.

7 THE COURT: Well, that brings me back to my
8 question. Am I really looking at these complaints to see if
9 they allege facts sufficient enough to assert a direct
10 claim; i.e., a control person claim?

11 MR. MURPHY: No, actually I -- let me come back,
12 Your Honor.

13 THE COURT: That seems to what be Judge
14 Sullivan --

15 MR. MURPHY: I was going to say Judge Sullivan
16 actually addressed this particular issue, and I think he
17 looked at it from the perspective of saying while it may
18 look on its face that I'm being asked to decide a 12(b)(6)
19 issue here, it's actually not. It feels the same, but it's
20 actually not. There's a different analysis.

21 I'm going -- Judge Sullivan looked at the
22 statements that were made, even with respect to allegations
23 that Picower was aware of the fraud, and that he directed
24 transfers, and that he was involved in making the statements
25 to -- you know, with respect to the accounts.

1 Judge Sullivan examined that and said, even
2 despite that, I can actually look at this, and I can
3 determine that these are actually fraudulent conveyance
4 claims, and they're duplicate and derivative. So he looked
5 behind it.

6 So I think this Court can do the same thing, and I
7 think that this Court should do the same thing. There's a
8 long history here of the bankruptcy court and Judge Sullivan
9 and Judge Koeltl and the Second Circuit doing the exact same
10 thing.

11 I think at first blush, Your Honor, to your point,
12 you know, we're asking the Court to look at these that
13 there's really nothing here that's not based on Picower's
14 withdrawals and the activities on the -- or things that flow
15 from that.

16 THE COURT: Well, I think one of the complaints,
17 maybe the Fox complaint says he induced other people to
18 invest, and somehow he induced or participated with Madoff
19 in sending the (indiscernible) sell to other investors,
20 which sounds like a securities fraud claim. Certainly
21 nobody's arguing that BLMIS committed securities fraud, and
22 the question is really whether Picower can be liable for
23 that. And should I look beyond those allegations or --
24 because those allegations weren't in the complaint I think
25 before Judge Sullivan, were they?

1 MR. MURPHY: No, I think that a large number of
2 them were, the basis for a lot of these claims were, Your
3 Honor. I think that there were three categories of claims
4 that are before you now, most of them were before prior
5 judges as well. I think that the initial kind of category
6 is that Picower directed false trades and false
7 documentation in his own accounts, and they took out large
8 amounts of money from those accounts.

9 And then if you step down to the next level, is
10 that as demonstrated by his conduct in his own accounts,
11 Picower had knowledge of the fraud, and influence and
12 control over BLMIS.

13 And then you get down to the next level, where we
14 are now, Your Honor, is that Picower's knowledge, influence
15 and control over BLMIS amounted to Picower making direct
16 misrepresentations to class action plaintiffs, and amounted
17 to an inducement by the Picowers for others to invest, and
18 to remain invested.

19 I think the first two of those categories, Your
20 Honor, was what Judge Sullivan saw, and what Judge Koeltl
21 saw, and the Second Circuit saw. But there isn't anything
22 here that's new, that's not based on Picower's activity.
23 This is what the --

24 THE COURT: Well, of course it's based on
25 Picower's activity, they're seeking to hold Picower liable.

1 MR. MURPHY: Yes, Your Honor, but what the prior
2 courts have decided is that all of that activity was
3 relating to Picower's activity in his own accounts. What he
4 did with his own accounts, how he got the money out, what he
5 was alleging in his own accounts.

6 The rest of it flowed from there, Your Honor, but
7 those are inferences that come from Picower's own activity.
8 And that is what the bankruptcy court, the district courts
9 in the Second Circuit all rejected, in terms of Picower's
10 liability. They all said it came back to that. And those
11 were harms to the estate. And that harm to the estate was
12 satisfied by the trustee's settlement.

13 THE COURT: Did any of the prior complaints allege
14 even in conclusory terms that Picower induced whatever
15 Madoff to send out phony confirmations to other customers?

16 MR. MURPHY: Your Honor, prior complaints said
17 that -- yes, I believe that they did. I believe that prior
18 complaints said that Picower had control. Picower
19 participated fully in the fraud. Picower made statements or
20 took activity relating to the fraud. I think that is
21 absolutely in the prior complaints, Your Honor. And I think
22 though some of those specific allegations are actually
23 addressed in Judge Koeltl's and Judge Sullivan's decisions.

24 I think though, Your Honor, if you look at it this
25 way, if you take away the fraudulent transfers, if you take

1 away activity that Picower did in his own account, with
2 respect to his own account statements, everything else
3 fails. All the other allegations fail because there's
4 nothing here that specifically says that Picower or that
5 establishes beyond mere conclusory statement.

6 THE COURT: It sounds like you're arguing a
7 12(b)(6) motion. That's why I asked the question, and let
8 me give you an example of what's bothering me or confusing
9 me.

10 I'm looking, I guess, at the Fox complaint, I'm
11 looking at paragraphs 117 and 118, and they say generally
12 that Picower induced BLMIS to send misleading statements to
13 other investors. Am I supposed to look at the sufficiency
14 of those allegations, or simply say if those allegations are
15 sufficient, they state a direct claim, I'm not ruling on the
16 sufficiency of the allegations, that's appropriate for a
17 12(b)(6) motion in Florida. That's what I'm getting at.

18 MR. MURPHY: Uh-huh.

19 THE COURT: Because I don't know the answer to
20 that.

21 MR. MURPHY: Okay. Here's what I would say, Your
22 Honor. I think that looking at this holistically from the
23 entire history of what's been done here, all the prior
24 complaints that have been pled, all of the statements and
25 allegations that have been made previously and rejected by

1 prior judges, what we have here now are mere conclusory
2 statements that flow, I say, directly from Picower's
3 activities on account. That was not directed, or any
4 directed to other customers here. Mr. Picower was a
5 customer.

6 THE COURT: Well, but they -- but they do allege,
7 and I know you disagree with the sufficiency --

8 MR. MURPHY: Uh-huh.

9 THE COURT: -- and you may be right, they do
10 allege that Picower induced BLMIS to send misleading
11 statements to others, and clearly sending misleading
12 statements to others would be a direct claim, assuming the
13 person received the statement and all the other elements of
14 fraud were present.

15 MR. MURPHY: Right.

16 THE COURT: There's -- and again, it sounds to me
17 like you're asking me to judge whether or determine whether
18 that is sufficient to state a direct claim. Since as they
19 started out saying, we know that a direct claim and a
20 derivative claim can arise from the same facts, or the same
21 general facts.

22 MR. MURPHY: I think, Your Honor, after multiple
23 bites at the apple, the class action plaintiffs haven't come
24 forward with particularized facts in their new complaints.
25 Your question is, we're not asking you to again judge this

1 from a 12(b)(6) standard, we're not going to use the posture
2 of the case, as Judge Sullivan said, to shield the
3 complaints from your scrutiny.

4 There aren't particularized facts that are alleged
5 with respect to Mr. Picower's activity vis a vis other
6 customers in this case. They -- the class action plaintiffs
7 do utilize specific allegations in certain instances. For
8 example, they will say, Mr. Picower made a trade on this
9 date in this amount from this account.

10 But then a follow-up paragraph will be a
11 conclusion that basically as a result of that, he must have
12 made some misrepresentation on a global basis to everybody,
13 and that he somehow intended that.

14 I think, Your Honor, what we're asking the Court
15 to do is not decide the 12(b)(6) issue, not look at this
16 from a securities claim issue, but to look at it, to see
17 what was alleged here, to see how close it is really, in
18 fact, when you tear away the overlay of what they're saying,
19 and look at it from the perspective of, this all flows from
20 Picower's accounts.

21 Again, take out the activity that he did in his
22 own accounts, there's nothing left. They don't have any
23 particularized facts.

24 I think that even with respect to the statement
25 that Picower was encouraging other people or inducing other

1 peoples, that's all based on his knowledge of the fraud and
2 the activity in his own account. But they use terms like
3 this amounted to something. But I'll suggest to the Court
4 that there's no facts that actually back up their
5 statements.

6 And I think the Court can look at it again,
7 because the Court is looking at this holistically, this is
8 not coming from a brand new view. Seventy-five percent of
9 this was already before prior courts, all the way up to the
10 Second Circuit. They looked at it, they tore it apart.
11 While on their face, some statements that Picower controlled
12 these accounts, that he was absolutely involved in the
13 fraud, they said that he was -- they allege that he was
14 involved in the fraud. I'm not sure how much more you need.
15 But that was found to be insufficient.

16 Judge Sullivan, I'll note, Your Honor, also
17 questioned how do you figure what is derivative claims here,
18 and how it applies, it sort of feels like you're accessing
19 the merits, it feels like it. But as he said, they're
20 distinct analyses, so that's how I would answer the Court's
21 point on that, Your Honor.

22 And the derivative claims here, according to the
23 Second Circuit, are those claims which arise from harm done
24 to the estate, and they seek relief against third parties
25 that push the debtor into bankruptcy.

1 Again, these points were all examined by the prior
2 courts, and they found, the Second Circuit found that the
3 plaintiffs here are trying to plead around the permanent
4 injunction because they allege nothing more than steps
5 necessary to affect Picower defendants withdrawals of money
6 from their accounts, it's their particularized conflict
7 direct with the BLMIS customers.

8 And by the way, Your Honor, the Goldman plaintiffs
9 specifically in their prior complaints had identified these
10 as securities claims, and as control person claims. It made
11 all those allegations previously, and previously were
12 rejected.

13 And that when Judge Sullivan looked at them, he
14 said, when you strip these of their conclusory language, the
15 only activity alleged is Picower's activities on accounts.
16 The same is true here, Your Honor, with respect to those,
17 there's no new facts alleged.

18 We compare the allegations, Your Honor, with the
19 original complaints with the allegations in the new
20 complaints in our briefs. And as I said before, the example
21 I gave you was comparing the specific allegations that they
22 have, that they have facts are, all relate to Picower's
23 activities on account versus the conclusory statements that
24 their activity amounted to something else, that all flows
25 from.

1 But absent any -- there's no allegations here that
2 Picowers had any contact with any of these customers. And
3 the only conduct alleged is with his own accounts. And by
4 the way, Your Honor, there's no relationship here between
5 Mr. Picower and any of these customers. There's not been
6 one alleged.

7 The harm that they allege here is the same that's
8 been suffered by every customer, they're all the same. An
9 illustration, Your Honor, I'd just like to go through with
10 you, a comparison of paragraph 69 to 71 of the initial
11 Goldman complaint, which discusses the false monthly
12 statements BLMIS sent each other which Judge Sullivan
13 observed, contained no allegations to Picower's directed or
14 were at all involved with the creation or dissemination of
15 these statements to customers.

16 THE COURT: Well, but now there are these
17 generalized allegations. They're general allegations, which
18 you say are conclusory, and I may agree, and it sounds to me
19 like what you're saying is, that even though this isn't a
20 12(b)(6) motion, I should ignore conclusory allegations and
21 look at the particular facts that are alleged to determine
22 whether or not they are direct of derivative claims.

23 MR. MURPHY: Exactly, Your Honor. And even more
24 so --

25 THE COURT: I'm not sure what the difference

1 between that and a 12(b)(6) motion is, but go ahead.

2 MR. MURPHY: Even more so, though, Your Honor,
3 I'll go back to the fact that they've had several bites at
4 the apple to try to allege this, and as you parse through
5 what these allegations, you're going to see what the prior
6 judges have found.

7 Again, they're using, you know, as a consequence,
8 this happened or that happened, but the new verbiage doesn't
9 affect that Picower is not alleged to have been directly
10 involved with the dissemination to any specific customers,
11 that he did any of this.

12 The -- what they're doing here, Your Honor, is
13 essentially adding to the chain of inferences that were
14 there before, that they had asked previous courts also to
15 make the conclusion. But they don't remedy that flaw, as
16 Judge Sullivan had found.

17 The Fox plaintiffs' second amended complaint that
18 they're attempting to file, you know, it doesn't do any
19 better here, Your Honor, in connection with their initial
20 complaint, which they effectively parroted the trustee's
21 complaint.

22 They argued to the Second Circuit that the claims
23 are independent because their complaints allege that the
24 Picower's wrongful conduct ensured the fraud success by
25 inducing them and other customers to remain invested and to

1 invest with BLMIS. The Second Circuit did not buy that,
2 Your Honor, but the Fox specifically argues it now. They
3 say that his conduct created -- in his own accounts, caused
4 the creation of false documentation that induced the Fox
5 plaintiffs and others to invest.

6 But like the former complaints, Your Honor, and
7 even the Goldman's new complaint, it merely infers Picower's
8 control over BLMIS' operation and decision-making, which
9 resulted in BLMIS picking the false statements upon which
10 they relied, based on Picower's conduct in his own accounts.

11 Two other points, Your Honor, with respect to the
12 Fox second amended complaint. I know that some of what they
13 allege, some of what's new here, I guess, is that they're
14 saying, according to Madoff. And so according to Madoff,
15 Picower actively encouraged. But again, if the Court looks
16 at this, there are no facts, which support an allegation
17 that Picower actively encouraged any of this.

18 THE COURT: Except Madoff said it supposedly.

19 MR. MURPHY: Except that he said it.

20 THE COURT: Well.

21 MR. MURPHY: And frankly, Your Honor, Mr. Madoff
22 has been lying for decades.

23 THE COURT: But can I judge that on the motion,
24 that's a question of proving it.

25 MR. MURPHY: I don't think you have to judge it,

1 but I don't think you have to give it weight.

2 THE COURT: Let me ask you a different question.

3 There is a motion pending in the Southern District of
4 Florida before Judge Marra which raises this same issue.

5 And putting Fox aside, we dealt with that last week, the
6 Judge in the Fox matter had his chance, and he decided, he
7 essentially abstained.

8 But in connection with the Goldman matter, there's
9 a pending motion which was made before I guess you made the
10 current or you filed the current complaint. Isn't it
11 appropriate for Judge Marra in the first instance to
12 entertain that. And then if he decides that he'll defer to
13 me to do so?

14 MR. MURPHY: I don't -- for once, Your Honor, I'll
15 start off with, I don't think this Court needs to wait. I
16 don't think that it should, I don't think its required to.

17 Judge Ryskamp, as you pointed out did defer.
18 Judge Marra has had these papers for quite a long time now.
19 He's aware of what's going on here. He has not taken any
20 action with respect to it whatsoever.

21 I would -- as I mentioned in my argument last
22 week, I think that this Court is the first court that we
23 need to go for questions as to whether something is
24 duplicative and derivative, or if somebody's trying to usurp
25 the estate's claims, whether settled or not.

1 That's a question for this Court, and I don't
2 think that that responsibility or that opportunity was
3 handed off to anybody whether through the Second Circuit
4 decision or by, you know, a potential activity down in the
5 Florida courts.

6 But again, Your Honor, I say that's -- at this
7 point, nothing's gone forward. There's been nothing
8 substantive that has actually taken place. It's all been
9 procedural, and the best insight we have is that Judge
10 Ryskamp deferred to Your Honor.

11 THE COURT: Okay.

12 MR. MURPHY: And I'll note, Your Honor, you know,
13 even as to that Eleventh Circuit appeal, we have no guidance
14 even today.

15 THE COURT: Okay.

16 MR. MURPHY: The -- I'll also add, Your Honor, the
17 sufficiency of what we have before you, what you have before
18 you is relevant only insofar as it affects whether the
19 claims are direct. And I think that's what the Court has
20 the possibility and the option to look at.

21 The -- going back to the Fox second amended
22 complaint, Your Honor, as previously I guess observed by the
23 Second Circuit, Fox second amended complaint here now if you
24 look at it again, it fails to allege quote, for instance
25 that the Picower defendants made any misrepresentations to

1 the appellants or any other customers. The --

2 THE COURT: I don't think they're accusing Picower
3 of a primary violation. That's not their argument. Their
4 argument is essentially that he aided and abetted Madoff.

5 MR. MURPHY: Right. The primary -- obviously the
6 person would be Madoff. But again, you're going to have the
7 opportunity to look behind the curtain to look at these
8 claims and to see whether they allege direct claims or not,
9 or really whether they're duplicative or derivative. I
10 think that's really the test, and that's really what Judge
11 Sullivan considered himself. And I think this Court also
12 has that opportunity.

13 I -- with respect to the statements as to what Mr.
14 Madoff said, Your Honor, none of those have any
15 particularity at all. There's no specificity really about
16 what was said, what was made, what backs up this statement.
17 But they appear, Your Honor, to be drawn from a book by
18 Diana Henriques and maybe some other public media
19 statements, but there's nothing in there that we see that
20 has any specific facts.

21 And I note, Your Honor, these plaintiffs are
22 before you. And I think they collectively represent
23 hundreds of customers. They've had years to come up with
24 what they're going to come up with. They're still relying
25 on something that they've either taken from a newspaper or a

1 book, or according to Madoff, but I'll note not -- there's
2 no allegations in these complaints that any of their clients
3 were made misrepresentations to, or that any of their
4 clients got something from Mr. Picower or relied on
5 something Mr. Picower did.

6 I would just want to add in, Your Honor, that the
7 -- their reliance on Medsker v Feingold (ph) is unavailing.
8 Because in Medsker, at least in that case, the defendants
9 were alleged to have made direct misrepresentations, and
10 taking specifically alleged action directly addressed
11 towards the plaintiffs, there's no such specific allegations
12 here or misrepresentations have been made, nor any
13 particular action directed toward any particular plaintiff
14 or putative class member. And where the only alleged
15 specific alleged activity was that taken by Picower in his
16 own accounts.

17 I'll turn now, Your Honor, to the fact that we
18 also say that this -- these activities violate the automatic
19 stay.

20 The claims here are certainly generalized, all of
21 the customers. They are generalized, they're duplicative,
22 and our position is that they violate the automatic stay.

23 Now, we believe that --

24 THE COURT: Could they violate the automatic stay
25 without violating the injunction?

1 MR. MURPHY: Excuse me, Your Honor? They violate
2 both.

3 THE COURT: Well, but could they violate one
4 without violating the other? Do I really --

5 MR. MURPHY: No.

6 THE COURT: -- I have to reach --

7 MR. MURPHY: You don't have to reach both. Yes,
8 you don't have to reach both, Your Honor. To that point
9 then, Your Honor, I will move along.

10 Just --

11 THE COURT: In other words, there's no difference
12 at this point?

13 MR. MURPHY: No, I don't think that there is, Your
14 Honor. I think --

15 THE COURT: If it's a derivative claim, it
16 violates the automatic stay and it violates the injunction.

17 MR. MURPHY: Exactly. And we say that these
18 claims are the estate's claims, and they're trying to also
19 under 362(a)(1) satisfy a claim against the debtor by going
20 into Picower's. So it's multiple violations.

21 Lastly, Your Honor, I'm going to turn back to the
22 mandate issue. I argued extensively on Thursday concerning
23 that. I'm not going to go through it again. I'm going to
24 adopt that argument.

25 THE COURT: Okay.

1 MR. MURPHY: I'll just highlight a few things from
2 that. Again, Your Honor --

3 THE COURT: And Mr. Smith will adopt his argument
4 and we can move on off of that one.

5 MR. MURPHY: What's that?

6 THE COURT: Mr. Smith will adopt his argument,
7 we'll incorporate it all by reference, and we'll move on.

8 MR. MURPHY: Well, for the benefit of the Goldman
9 plaintiffs, Your Honor, I'll just very quickly highlight a
10 few points --

11 THE COURT: Okay.

12 MR. MURPHY: -- I think they're going to address
13 it.

14 It was a 28-paged decision, Your Honor, from
15 the --

16 THE COURT: I don't think -- is Goldman making
17 that argument that this Court lacks jurisdiction?

18 MR. STONE: Your Honor, it's not our position that
19 the mandate required the case to be filed --

20 THE COURT: Okay. All right. So good, we've
21 dealt with this.

22 MR. MURPHY: Okay.

23 THE COURT: Thank you.

24 MR. MURPHY: Okay, Your Honor. I'll note lastly
25 that the bankruptcy court expressly retained jurisdiction

1 over the permanent injunction in any disputes arising or
2 otherwise relating to it. And as I mentioned, the fraud
3 actions have not progressed.

4 And by the way, also, they haven't actually
5 briefed anything like the duplicative derivative issue that
6 we are fully briefed here on before Your Honor today.

7 THE COURT: Okay.

8 MR. MURPHY: Thank you, Your Honor.

9 MR. STONE: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. STONE: Richard Stone for the Goldman parties.

12 Your Honor, I think you've picked up on many of
13 the issues that we've addressed in our brief. And before I
14 go into the substance of my argument, I wanted to make clear
15 that we have solely one claim in the Goldman case, that's
16 20(a).

17 20(a) is a provision of federal law that provides
18 for joint and several liability against the party who does
19 not make direct misrepresentations, but does not directly
20 participate in fraud, but who controls or who has the
21 ability to control the party who does.

22 So the trustee's continuous refrain that we
23 haven't alleged direct contact, direct misrepresentation
24 from Picower to underlying investors is irrelevant. That's
25 a 10(b) case. We didn't plead a 10(b) case. BLMIS

1 committed a 10(b) violation, a series of them. Mr. Madoff
2 was criminally indicted for that, the SEC brought a case
3 against BLMIS for that, there's no question.

4 What we are alleging is that Picower, an
5 individual who was able to control the books and records at
6 will of a broker dealer --

7 THE COURT: Well, but only within his own account.
8 There's no -- is there an allegation that he controlled the
9 books and records -- well, that's a two part question.

10 The first is, am I supposed to look at the
11 complaint as I asked Mr. Murphy essentially to determine if
12 there's a control --

13 MR. STONE: Mr. Stone, I'm sorry.

14 THE COURT: No, I asked Mr. Murphy --

15 MR. STONE: Oh, yes, I'm sorry.

16 THE COURT: -- am I supposed to look at the
17 complaint to determine if there's a sufficient control
18 person claim alleged or do I simply look at the complaint,
19 which is what Judge Sullivan did holistically to determine
20 whether it was based upon Picower's withdrawals of funds
21 from the -- from BLMIS and his manipulation of the accounts
22 I guess it was kind of a corollary to that. What am I
23 supposed to be looking for?

24 MR. STONE: Your Honor, as I'm going to address, I
25 don't think Your Honor should do anything. I think Your

1 Honor is correct that Judge Marra has jurisdiction over this
2 matter. The case was first --

3 THE COURT: Well, we both do.

4 MR. STONE: Right.

5 THE COURT: The Second Circuit, you know, neither
6 of you settled it -- cited it --

7 MR. STONE: Right.

8 THE COURT: -- but there's a Baldwin United (ph)
9 case, we both have jurisdiction --

10 MR. STONE: Right.

11 THE COURT: -- to determine whether the automatic
12 stay applies and presumably whether the injunction applies.

13 MR. STONE: Correct, Your Honor. But I don't
14 think this Court has jurisdiction to prevent us, or in any
15 way enjoin us from proceeding in front of Judge Marra.

16 THE COURT: Well, what if I determine -- Judge
17 Marra hasn't done anything yet. What if I determine that
18 your claims violate the permanent injunction? Can't I issue
19 an injunction to prevent you from prosecuting that?

20 MR. STONE: We don't think so, Your Honor. The
21 case is pending in front of a federal district court judge
22 who clearly has jurisdiction over that matter. He has not
23 issued the stay that has been requested by the Picower
24 defendants, the parties in interest, who have appeared in
25 Florida, litigated in front of Judge Marra, okay. This is

1 the trustee appearing here today, not the party in interest
2 in our case.

3 THE COURT: So you're saying I don't have
4 jurisdiction --

5 MR. STONE: Correct.

6 THE COURT: -- to issue an injunction to prevent
7 you from asserting a claim, even though I have jurisdiction
8 to determine that your activities violate the injunction?

9 MR. STONE: In the same way that if two courts
10 have equal jurisdiction over a matter, two district courts,
11 and the first court that has that matter in front of it is
12 ruling on it. The second court, under rules of comity and
13 federal jurisdiction defers to the first court.

14 You can't have two courts handling the same matter
15 at the same time. In this case, the first instance of this
16 issue being raised vis a vis our proposed, not filed, our
17 draft amended complaint was to a declaratory action in
18 federal district court.

19 Federal district courts have exclusive
20 jurisdiction over federal securities claims. They have
21 expertise in federal securities claims.

22 THE COURT: But I have jurisdiction to interpret
23 the injunction.

24 MR. STONE: You do, but so does that judge and
25 that judge took --

1 THE COURT: I'm not arguing --

2 MR. STONE: This is sub judice first.

3 THE COURT: -- with you that -- I grant you, we
4 both have jurisdiction and the question is who should decide
5 it.

6 MR. STONE: I don't think that's correct, Your
7 Honor. I think Judge Esterbrook's (ph) decision that I
8 cited in 140 B.R. 969 and also In Re Tech Net, 2007 --

9 THE COURT: What about the Second Circuit's
10 decision in Baldwin United?

11 MR. STONE: I agree that Your Honor has
12 jurisdiction, okay, but the jurisdiction of the district
13 court is also pending now. What you would be doing by
14 ruling is usurping the jurisdiction of the federal district
15 court which had this matter in front of it first.

16 THE COURT: So you're essentially arguing that the
17 first in time, first in right principle. The issue was
18 first presented to Judge Marra and he should decide it.

19 MR. STONE: Right. And also, that as Judge
20 Esterbrook clearly stated, a bankruptcy court cannot enter
21 an order even when it has equal jurisdiction to a federal
22 district court, when that federal district court has sub
23 judice the same matter, i.e., violation of the stay and the
24 permanent injunction.

25 They have not rebutted those cases at all, Your

1 Honor. We think that's black letter law.

2 If I could start from the beginning now. I just
3 wanted to make clear --

4 THE COURT: Go ahead.

5 MR. STONE: -- that a 20(a) case doesn't require
6 direct misrepresentations. And I'm going to read from the
7 complaint the various allegations showing this control
8 relationship.

9 THE COURT: Okay.

10 MR. STONE: Remember, Your Honor, typical control
11 person case is where an individual who's a director, or an
12 outside accountant participates in a fraudulent
13 misrepresentation or a scheme of fraud, and is then held as
14 a control person because he had the ability to prevent that
15 misrepresentation or otherwise.

16 We have much more than that, Your Honor. We have
17 an individual who day-to-day was dictating the books and
18 records of a broker dealer. What is a broker dealer?

19 THE COURT: Other than his account, what are the
20 allegations that he did with respect to --

21 MR. STONE: I'm going to read those, Your Honor.

22 THE COURT: Okay.

23 MR. STONE: The allegations that he controlled the
24 direct misrepresentations to underlying investors --

25 THE COURT: That sounds conclusory to me.

1 MR. STONE: But, Your Honor, this --

2 THE COURT: What are the facts --

3 MR. STONE: Federal Rule of Civil Procedure 8
4 applies here, not 9(b).

5 THE COURT: But you still have to allege facts,
6 don't you?

7 MR. STONE: We have to allege a reasonable basis
8 for the Court to conclude that we have met the pleading
9 standard under Rule 8.

10 THE COURT: Okay. So if I have to decide that, it
11 sounds like I'm deciding whether you pleaded a control
12 person claim.

13 MR. STONE: Well, we don't think that the Court
14 should do that. We think the federal court that has
15 exclusive jurisdiction --

16 THE COURT: So what you're telling me about Rule 8
17 --

18 MR. STONE: Right.

19 THE COURT: What you're telling me about Rule 8 is
20 I'm not supposed to review this as a 12(b)(6) motion.

21 MR. STONE: Well, I'm trying to be clear that
22 that's the rule that would apply, Your Honor, because the
23 trustee is asking this Court to decide a motion that should
24 be decided by a district court in Florida.

25 First, Your Honor --

1 THE COURT: Didn't Judge Sullivan refer to Rule 8
2 or Rule 9(b)?

3 MR. STONE: He did not.

4 THE COURT: All right. So it sounds like those
5 rules don't apply, and I'm just supposed to make a
6 determination whether you're simply asserting a dressed-up
7 derivative claim.

8 MR. STONE: Well, why would Your Honor elect to do
9 that when there's a federal district court judge -- and by
10 the way this Medsker case that they cite, that we disagree
11 about, we both spilled a lot of ink on that, that's fair to
12 say.

13 THE COURT: Yeah, I read the complaint.

14 MR. STONE: This is Eleventh Circuit case law,
15 we've got a district court in the Eleventh Circuit. We
16 think Medsker stands for exactly what we're saying. Two of
17 the individuals in that case had no direct relationship, and
18 were only control persons.

19 THE COURT: Yeah, but I recall going through
20 allegations, Feingold participated in the creation of a
21 couple of documents that were sent to investors I guess.

22 MR. STONE: It's clear from the decision, Your
23 Honor, that two of the defendants, and I can indicate who
24 they were, had no --

25 THE COURT: Basso (ph) and Feingold.

1 MR. STONE: Feingold and Basso were only control
2 persons, Your Honor.

3 THE COURT: I understand, and there were -- but
4 there were allegations in the complaint, again I looked at
5 it with Feingold, not with Basso, that he actually created
6 certain specific documents that were sent to I guess the
7 plaintiffs.

8 MR. STONE: In any event, that was not the case
9 with respect to the Basso defendant, who was solely a
10 control person, where the Eleventh Circuit held that claim
11 applies to. And that clearly is our case.

12 But my point is, Your Honor, there's a lot of law
13 on this, and it's in the Eleventh Circuit where we're
14 litigating. Why not let that district court handle it?

15 I want to make an initial point, Your Honor, which
16 we've made I think extensively in our brief. We don't
17 believe that what we have done violates the stay or could
18 violate the stay or the permanent injunction. We haven't
19 sued anyone.

20 THE COURT: I agree, you can ask, I mean, you
21 can't be violating something, if you're simply asking if
22 you're violating it.

23 MR. STONE: Correct. So the relief that they
24 seek, an order finding that we violated the stay in Georgia
25 can't be granted. We haven't violated the stay. And the

1 case law is clear that we can go to a district court without
2 fear of violating the stay, without fear of sanctions
3 against counsel or client, and ask them for this relief, and
4 that's exactly what we've done.

5 So the relief they're asking for is inappropriate
6 and inconsistent with the case law that we cited, In Re the
7 Conference of African Union Church, 184 --

8 THE COURT: Yeah, wasn't that procedurally what
9 happened though the first time you proceeded in the Southern
10 District of New York, didn't you ask for a declaration that
11 what you were doing was not violating the injunction?

12 MR. STONE: We first proceeded in front of Judge
13 Lifland.

14 THE COURT: Okay. But that was what you asked,
15 right? And he concluded --

16 MR. STONE: Initially.

17 THE COURT: -- that you were.

18 MR. STONE: Correct.

19 THE COURT: And he concluded you had violated the
20 stay by doing that, or just violated the injunction?

21 MR. STONE: I believe he concluded we violated the
22 stay as well.

23 THE COURT: Okay. And Judge Sullivan affirmed
24 that.

25 MR. STONE: Affirmed on --

1 THE COURT: So obviously there was a live
2 controversy just by your seeking declaratory relief.

3 MR. STONE: There was no live controversy. We're
4 seeking new relief in a new case. That case was gone.

5 THE COURT: But my -- what I'm getting from your
6 argument is you can't be violating the stay or the
7 injunction by simply asking whether or not you're violating
8 the stay or the --

9 MR. STONE: Correct.

10 THE COURT: -- injunction. And that sounds to me
11 exactly what you did before Judge Lifland.

12 MR. STONE: Right. That is what we did.

13 THE COURT: And he --

14 MR. STONE: And that didn't violate the stay by
15 asking him for that relief --

16 THE COURT: Okay. Now, let's forget about the --

17 MR. STONE: -- we agree, and it doesn't now
18 either.

19 THE COURT: -- stay. I mean, the basic question
20 is, whether the action you proposed violates the injunction
21 and it seemed like that request was sufficient to trigger
22 the bankruptcy court's and the district court's jurisdiction
23 to determine that what you're doing violates the injunction.

24 MR. STONE: And had we commenced this action the
25 same way by coming in front of Your Honor first, I agree

1 with that. But we elected to go to another court that has
2 jurisdiction and we're entitled to do that. And once we had
3 done that, and jurisdiction vests there, that is not a
4 violation of the stay.

5 THE COURT: I agree with you that the district
6 court has jurisdiction to determine whether the automatic
7 stay is violated. It doesn't necessarily follow that you're
8 filing an action in another court that has that jurisdiction
9 doesn't violate the stay.

10 MR. STONE: I don't -- Your Honor, with all due
11 respect, we're not asking for relief against the estate.
12 We're not asking for relief against the Picowers. We're
13 asking for an order from a district court that we have a
14 draft complaint, and we're asking that court to determine
15 that if we were to file that draft complaint, if, would we
16 violate the stay. I don't understand, and the trustee's
17 made no argument that that is --

18 THE COURT: It sounds like an advisory opinion.

19 MR. STONE: I mean --

20 THE COURT: Why don't you just file a complaint?

21 MR. STONE: Because we didn't want to violate the
22 stay or be sanctioned for that, Your Honor.

23 THE COURT: All right.

24 MR. STONE: That's why. But the courts adhere to
25 this process. I mean, I've cited three or four cases where

1 this is exactly what's being done, and the courts have said
2 that that doesn't violate the stay.

3 THE COURT: Uh-huh.

4 MR. STONE: Just like it didn't violate the stay
5 when we came in front of Judge Lifland, which is correct.

6 THE COURT: Yeah, he determined that what you
7 proposed violated the injunction and that was affirmed.

8 MR. STONE: Right. And Judge Marra may decide the
9 same, we don't think so, but he has the right to do that.
10 And if he does decide that it violates the stay, there will
11 be no case filed, and there will be no violation of the
12 stay.

13 THE COURT: Has anybody requested a conference
14 before Judge Marra to determine whether he intends to
15 proceed or defer?

16 MR. STONE: If I could --

17 THE COURT: Because I have the matter in the Fox
18 -- the fax (ph) case anyway, so I'm going to decide it.

19 MR. STONE: If I could address that, Your Honor.
20 We -- what's happened in that action is, initially the
21 Picowers, not the trustee, responded in Florida voluntarily
22 seeking to dismiss that action for improper service, and to
23 stay. The improper service issue is over. They've agreed
24 in their brief that we have properly served them.

25 So we have a call into Judge Marra's chambers to

1 the clerk that's working this, asking him to schedule a date
2 for their answer. Because at this point, they have nothing
3 pending except the stay, and that doesn't preclude or extend
4 their time for answering it.

5 THE COURT: But it's a motion for a stay, I mean,
6 the similar thing occurred with Fox. There's a motion for a
7 stay, either pending some determination of this court or
8 pending some -- at that point, some contemplated filing in
9 this court.

10 So there is some -- there is a live motion before
11 Judge Marra which raises this issue, right?

12 MR. STONE: Correct, yes.

13 THE COURT: And has that motion been fully
14 briefed?

15 MR. STONE: We have filed a summary judgment
16 motion with respect to our claim that it doesn't violate the
17 automatic stay.

18 THE COURT: So why don't you ask for a conference
19 on the stay motion before Judge Marra and say, look, this
20 issue is before the court here, you know, if he's going to
21 decide it, he's going to decide it. But something good to
22 know.

23 MR. STONE: We agree with that, Your Honor, and we
24 did call chambers on Friday and asked for that scheduling,
25 and the clerk was away until this Thursday, and we will

1 immediately do that on -- by getting back to Florida.

2 So, Your Honor, my first two points, just to
3 summarize are that one, the Court lacks jurisdiction because
4 this is pending in the federal district court. And that
5 there is no violation of the stay, or the permanent
6 injunction that can be found. What we have done can't
7 violate the stay there for the relief they seek can't be
8 ordered by this Court.

9 THE COURT: I disagree with you that I lack
10 jurisdiction, putting aside the mandate issue. It may be
11 appropriate for me not to exercise it, just as the Second
12 Circuit determined in Baldwin United that it was
13 inappropriate for the district court to exercise its
14 jurisdiction to determine whether or not the stay was
15 violated. But I don't think it's a jurisdictional issue.

16 MR. STONE: But doesn't that run the risk of two
17 courts reaching a decision at approximately the same time
18 that are inconsistent.

19 THE COURT: That's why the Second Circuit said the
20 bankruptcy court should decide it first.

21 MR. STONE: Well, that isn't what's occurred here.
22 The case was first filed in --

23 THE COURT: I understand.

24 MR. STONE: And that was a matter of discretion
25 and the posture of that case.

1 THE COURT: Okay. I understand your argument.

2 MR. STONE: Okay.

3 THE COURT: I'm just disagreeing that it's an
4 issue of jurisdiction. It's an issue more of deference or
5 whatever.

6 MR. STONE: Thank you, I understand.

7 Apart from lacking -- apart from my first two
8 issues, I won't repeat them, I respectfully disagree. We
9 think that Florida is the right place --

10 THE COURT: People disagree with me all the time.

11 MR. STONE: Okay. We think --

12 THE COURT: Starting before I leave the house, but
13 go ahead.

14 MR. STONE: There's nothing unusual about this
15 case proceeding in Florida on this part of the case. The
16 case was always intended to be in Florida. It was always
17 venued in Florida. The case that we sought to proceed with
18 in front of Judge Lifland was venued in Florida. The
19 attorneys are located in Florida, and it's clear that the
20 Florida court has jurisdiction.

21 Second, as the case is going to be litigated in
22 Florida if it proceeds, it's going to be litigated under
23 Eleventh Circuit federal securities law. Okay. Why not let
24 the judge who's familiar with that -- there's exclusive
25 federal jurisdiction, bankruptcy courts do not have

1 jurisdiction to securities matters. Okay.

2 Even under 157 when there's a securities matter in
3 front of your court --

4 THE COURT: But I know I had a case a long, long
5 time ago where somebody brought a class action, federal
6 securities class action, and I certainly had jurisdiction to
7 determine whether or not the claims were derivative or
8 direct.

9 MR. STONE: We --

10 THE COURT: And to apply the automatic stay --

11 MR. STONE: We absolutely agree --

12 THE COURT: -- and I think they were derivatives
13 so.

14 MR. STONE: -- with that, Your Honor.

15 But in a case where we have a complex issue that's
16 been up to a federal district court once, where there's a
17 disagreement over whether Eleventh Circuit law applies, it
18 seems appropriate that a district court judge in that
19 circuit would apply that law.

20 THE COURT: But on the same vein, we have two
21 district court decisions, and a Second Circuit decision
22 which tell us what is a derivative claim and what is a
23 direct claim in this very case. Doesn't it make sense for
24 this to be litigated here?

25 MR. STONE: I don't think so, Your Honor, because

1 Eleventh Circuit law is going to apply that if --

2 THE COURT: If it's a securities law claim.

3 MR. STONE: Right.

4 THE COURT: But I first have to determine whether
5 it's a derivative claim or not, and isn't that governed by
6 the Second Circuit's decision on Fox, and Judge Koeltl and
7 Judge Sullivan's decisions and Judge Lifland's decisions?

8 MR. STONE: I think it is governed by -- Judge
9 Koeltl's decision doesn't deal with 20(a), Judge Sullivan's
10 decision deals with 20(a).

11 THE COURT: Yeah, but they talk about what a --
12 okay. They do talk about what is a derivative claim --

13 MR. STONE: Correct.

14 THE COURT: -- and what is a direct claim in this
15 very context.

16 MR. STONE: Right, that's correct. I agree with
17 that, Your Honor.

18 Okay. I also want to make the point that here,
19 the Picowers themselves appeared in federal district court
20 in Florida.

21 THE COURT: What are they supposed to do, you sued
22 them?

23 MR. STONE: No, they could've come here and asked
24 for a TRO. That's what happened last time.

25 THE COURT: But that's essentially what the

1 trustee did because he's contractually obligated.

2 MR. STONE: But the trustee isn't the party in
3 interest, the Picowers are. This isn't an estate matter
4 anymore, we're suing the Picowers, who got a general release
5 from the estate.

6 THE COURT: Well, it is an estate matter if you're
7 seeking to usurp a claim that belongs to the estate and the
8 estate settled.

9 MR. STONE: Agreed, Your Honor. But if it's not,
10 and we are to proceed, then it's not --

11 THE COURT: Well, but that's --

12 MR. STONE: -- and it will be litigated in --

13 THE COURT: -- what has to be decided whether or
14 not --

15 MR. STONE: I agree, okay.

16 THE COURT: -- you -- I agree with you that if
17 you're not usurping an estate claim, then it will be
18 litigated in Florida.

19 MR. STONE: Okay. What I want to do now, Your
20 Honor, is walk through the complaint because if there's
21 substance on the issue, and address the points that were
22 raised by Judge Sullivan.

23 And again, this is a 20(a) case, not a 10(b) case.
24 So what Judge Sullivan said was, how he -- why he criticized
25 our prior complaint was that he said, control consisted

1 solely of the Picower defendants, directing fictitious
2 trades in and withdrawing proceeds from their accounts.

3 So doing the trades and withdrawing proceeds.
4 That's what he said we alleged only. Stated it differently,
5 all the book entries and fraudulent trading records refer to
6 nothing more than fictitious records BLMIS made for the
7 Picower defendants themselves.

8 Okay. So let's look at the allegations and see if
9 we've gone beyond that. What he's said we should have done
10 and could have done, or maybe could have done, was make an
11 allegation that the Picower defendants directed the creation
12 or dissemination of false statements to other BLMIS
13 customers. That would've been sufficient in his mind.

14 As to fraud to other customers, the complaints are
15 completely silent about the Picower defendant's involvement.
16 Okay.

17 So let's go through the complaint and see what
18 we've done vis a vis that.

19 First, paragraph 71.

20 THE COURT: Wait, I'm looking at your complaint, I
21 have it. 71?

22 MR. STONE: This is in the Golden complaint draft.

23 THE COURT: Just give me a minute. Okay.

24 MR. STONE: Picower's ability to direct the
25 creation and dissemination of false and misleading trade

1 documents which he knew would be incorporated in financial
2 disclosures made by BLMIS, a highly regulated broker and
3 investment advisor shows that Picower exercised, directed,
4 and direct control over the day-to-day operations of BLMIS
5 and specifically over trading activity that constituted a
6 violation of the securities laws.

7 THE COURT: Sounds pretty conclusory to me.

8 MR. STONE: Your Honor, again, you're -- what's
9 the pleading standard that Your Honor would like to apply
10 here? We have to give a plain and simple statement, okay,
11 we haven't had any chance to take discovery. Yes, the case
12 has gone on for years, but we haven't gotten one bit of
13 discovery.

14 THE COURT: But you don't get to discovery unless
15 you plead facts sufficient, in essence, to survive a motion
16 to dismiss.

17 MR. STONE: Okay.

18 THE COURT: I realize this isn't a motion to
19 dismiss.

20 MR. STONE: Right. I'm going to continue here.
21 The volume, pattern, and practice of Picower's control of
22 the defendant's documentation of underlying transactions,
23 including the direction of false reporting of customer
24 assets and returns in monthly statements to plaintiffs, as
25 well as Picower's direct or indirect control over the

1 benefits of the Ponzi scheme establish control.

2 We are alleging that he had control over the
3 reporting of customer assets in their monthly statements.

4 THE COURT: Well, no, I understand that's what
5 you're alleging. But the argument that's being made is
6 those are conclusory allegations, and I should ignore them,
7 and for the purposes of determining whether it's a
8 derivative claim or a direct claim.

9 MR. STONE: Under what theory would the Court
10 ignore them?

11 THE COURT: Well, they're conclusory allegations.

12 MR. STONE: But what the pleading standard --
13 that's not the pleading standard that we think should apply.
14 We think rule -- Federal Rule of Civil -- what Your Honor is
15 doing I think is actually applying Federal Rule of Civil
16 Procedure to this complaint.

17 THE COURT: Well but that's --

18 MR. STONE: You're reviewing it as if it were a
19 motion to dismiss.

20 THE COURT: That's the issue I raised with counsel
21 for Mr. --

22 MR. STONE: And I don't think that's appropriate.
23 I don't -- again, I don't think the Court has the ability to
24 determine that, that's a motion to dismiss that should be
25 directed to the district court.

1 If I could continue. Paragraph 90, Picower
2 actively communicated and agreed with Madoff and other BLMIS
3 personnel to perpetuate the fraud. Picower had a close
4 relationship with Madoff and BLMIS, and directly, indirectly
5 ensured that Madoff and BLMIS concealed the fraud from other
6 customers.

7 Picower directly or indirectly induced BLMIS'
8 misleading statements to others. These misrepresentations
9 induced BLMIS customers to pay BLMIS for non-existent
10 securities. That's a classic statement of control personal
11 liability. I controlled an entity that made misstatements
12 that I directed them to make.

13 Paragraph 91. Picower intimate knowledge and
14 involvement in the operations, records, recordkeeping and
15 financial management of BLMIS. That's pretty specific, Your
16 Honor.

17 Picower directly or indirectly induced the
18 material misrepresentations and omissions giving rise to the
19 securities violations alleged herein. Those would be BLMIS'
20 misrepresentations to the underlying customers.

21 THE COURT: You know I understand, Mr. Stone, what
22 you're arguing. My question is not whether you're asserting
23 what purports to be direct claims. My question is in
24 reviewing the complaint, what standard am I supposed to
25 apply. And am I really bound by whether or not you've pled

1 a sufficient control person claim, or am I simply looking at
2 the complaint as Judge Sullivan did, without regard to Rule
3 8(a), and looking at the well-pleaded facts, I guess, and I
4 know it sounds like a motion to dismiss when I use a phrase
5 like that, and deciding whether you're just trying to
6 circumvent the trustee's derivative claim.

7 MR. STONE: But, Your Honor, we're not
8 circumventing it. What Judge Sullivan was concerned about
9 was that the allegations simply related to documents
10 concerning Mr. Picower's fraudulent accounts, that there was
11 no connection between that and BLMIS' misrepresentations to
12 the customers. Not that we made direct misrepresentations,
13 but we didn't connect how those false book entries amounted
14 to misrepresentations to customers and we have.

15 What we've said is, they are incorporated in the
16 monthly statements made to customers. Picower had the
17 incentive to hide the fraud or he would've gotten too, and
18 gone to jail just like Mr. Madoff.

19 And the way that he did that was by directing them
20 to make false misrepresentations in the monthly statements
21 of the assets that were in their account. That's a massive
22 amount of control.

23 THE COURT: So you're saying, your complaint
24 alleges that Picower directed Madoff to make false
25 statements in the other customers' accounts?

1 MR. STONE: Correct.

2 THE COURT: Where do you allege that?

3 MR. STONE: I read it to you, Your Honor.

4 THE COURT: That's not what I heard.

5 MR. STONE: Okay. As a result of --

6 THE COURT: I heard generalized language that he
7 directly or indirectly caused BLMIS.

8 MR. STONE: Paragraph 67, as a result of Picower's
9 control, he caused BLMIS to present plaintiffs with false
10 and misleading information; i.e., inflated account values,
11 in order to induce those investors to remain invested in
12 BLMIS, and to continue to attract new investments in BLMIS.
13 If plaintiffs had been provided with accurate information,
14 they would've attempted to protect the value, and the Ponzi
15 scheme would have collapsed.

16 THE COURT: Does your complaint allege or proposed
17 complaint allege what he did in order to cause BLMIS to
18 issue these false statements?

19 MR. STONE: What it says is that he controlled the
20 process.

21 THE COURT: I understand the word control, but
22 does it say what he did to control the process?

23 MR. STONE: Yes. He had phony account records
24 created that masked his theft of money.

25 THE COURT: That sounds like what the Second

1 Circuit and Judge Sullivan were warning about in the last
2 complaint, that was based on the manipulation of his records
3 so that he could withdraw money from BLMIS.

4 MR. STONE: But it is not. It is based on the
5 manipulation of the records to the customers. And, Your
6 Honor, there's a slippery slope here. You agree I think,
7 Your Honor, that the same facts can lead to an estate claim
8 and a securities claim. That's quite common. Okay.

9 I think that's what Your Honor is saying. Yes,
10 the fact that he stole money and had phony trades parked in
11 his account and had the records gerrymandered to reflect
12 that, okay. Did lead to the fact that there was a necessity
13 to do that in customer accounts also to protect the fraud.
14 So what? So what? Every fraud has to be covered up, and
15 it's the cover-up that may lead to misrepresentations to
16 other parties. That's the nature of securities fraud.

17 I commit a theft at a company and I lie about it.
18 That's the securities fraud. So the two acts lead to two
19 things. One, conversion or fraudulent conveyance; and two,
20 misrepresentations. And that's what we're alleging here. I
21 don't think it could be more direct.

22 He caused BLMIS to present plaintiffs with false
23 and misleading information; i.e., inflated account values.
24 I don't think we have to allege that he physically wrote
25 them, or the exact process by which we do. We know that he

1 had an assistant who made phone calls to the BLMIS trading
2 desk, and had them rearrange trading records at will.

3 THE COURT: Go ahead.

4 MR. STONE: A broker dealer consists of two
5 things, securities and cash. There's a master ledger of all
6 the securities' positions, and there's a master ledger of
7 the cash. The amount of securities' positions in customer
8 accounts has to add up to what you actually own at the
9 broker dealer.

10 A misrepresentation in account A that you own X
11 has to result in a misrepresentation of account B, telling
12 them that they own X when they don't own X. It's a
13 necessity. So by directing --

14 THE COURT: Isn't that a secondary effect of his
15 withdrawing this money from the estate?

16 MR. STONE: It's not a secondary effect. It's an
17 effect that we allege he knew about and directed. It's not
18 a natural effect, they could've told the truth.

19 THE COURT: I guess we wouldn't be here today.

20 MR. STONE: Correct.

21 THE COURT: Okay.

22 MR. STONE: They could have made a different
23 misrepresentation. They could've gotten a loan from a third
24 party to make up for the losses and lied to that guy. There
25 are lots of ways to hide a fraud. They chose to hide the

1 fraud by lying to prospective investors and current
2 investors, and that's what Picower directed.

3 And there's no question he had the ability to
4 manipulate the records of the company. I don't think we
5 can, and I litigated many control person case, but I've
6 never had one where we were so micro on the issue. Control
7 is a general theory, do you have the ability to control
8 what's going on at the company.

9 Yes, he had the ability to control the cash flow
10 in and out at will. He had the ability to control the books
11 and records. He had the ability to hide his fraud by
12 directing Picower, by directing Madoff and the Madoff
13 employees to lie to customers about what was in their
14 accounts, to protect the fraud. That's massive control.

15 More than I -- in all honesty, Your Honor, more
16 than I've ever seen in a control person case. Again, a
17 typical control person case is where an accountant
18 participates in a single misrepresentation that's made by a
19 third party in his role in participating in that is
20 sufficient to impose control personal liability, Your Honor.

21 Picower was using Madoff to steal money at the
22 expense of the underlying customers. There's no doubt about
23 it. That was his scheme.

24 Can I tell you --

25 THE COURT: Does that mean that anybody who got a

1 distribution in this case with knowledge of the Ponzi scheme
2 is a control person, because they would have to know that
3 Madoff would have to steal the money from somebody else?

4 MR. STONE: No. Because those people didn't
5 necessarily have the ability, I don't know.

6 THE COURT: So the knowledge --

7 MR. STONE: And to my knowledge, they didn't have
8 the ability to control the trading records.

9 THE COURT: So the mere knowledge that you're
10 creating a situation where you know that somebody has to
11 steal money in order to pay you, steal money from others,
12 doesn't create control personal liability?

13 MR. STONE: Not unless, I believe, Your Honor,
14 you're controlling the firm. In this case, we have control
15 through the control of the records.

16 Again, this isn't a manufacturing company, we're
17 making a simple misrepresentation about what we produced or
18 our venue. This is a broker dealer that has stock and
19 money. He's lying about the money and he's lying about the
20 stock, and he's directing them to transmit those lies in
21 thousands of monthly statements to underlying customers.
22 That's our theory of the case.

23 How did that happen? It happened through
24 communications. Through e-mails, through phone calls, we
25 have some of those phone calls and some of those e-mails.

1 We don't have all of them, because we haven't gotten
2 discovery.

3 THE COURT: All I'm looking at is the complaint at
4 this point.

5 MR. STONE: I understand that.

6 THE COURT: All right.

7 MR. STONE: Okay. So if I could just -- I think
8 I've read enough of the allegations from the complaint, Your
9 Honor. I just wanted to read one more, which is paragraph
10 77 which I think is sort of the summary paragraph.

11 The volume pattern and practice of Picower's
12 control over fraudulent documentation of underlying of
13 transactions at BLMIS, including the direction of false
14 reporting of customer assets and returns in monthly
15 statements to plaintiffs, as well as his direct and control
16 over the benefits of the Ponzi scheme establish control.

17 So we have made the connection, and I believe
18 sufficient to survive a Federal Rules of Civil Procedure 8
19 motion, that he directed the misrepresentations that were
20 made to customers to hide his theft.

21 And we don't think that this Court should go
22 anywhere beyond that, doing any other analysis. There's
23 been no briefing of the pleading standard as if this was a
24 motion to dismiss or case law on control person liability.
25 I think that's way beyond the scope of where we are here

1 today, and should be handled by the district court.

2 Again, Your Honor, we're not alleging a 10(b)
3 case. We're alleging a control person case. That's my
4 argument. Do you have any other questions?

5 THE COURT: No, thank you very much.

6 MR. STONE: Thank you.

7 MR. SMITH: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. SMITH: Peter Smith for the Fox plaintiffs.
10 I'm going to try not to cover old ground, and surely not to
11 undo anything, any good work that Mr. Stone has done. I
12 incorporate by reference the mandate arguments I made last
13 week.

14 THE COURT: Thank you.

15 MR. SMITH: But having said that, I just would
16 like to speak about the mandate briefly, which is only
17 lawyers could make such a mess of this.

18 You know --

19 THE COURT: You're a lawyer, right?

20 MR. SMITH: Yeah, but I didn't create this mess.
21 The Fox plaintiffs didn't have a 20(a) claim, so whatever
22 the Second Circuit said, it didn't apply to the claim that
23 they've brought now.

24 THE COURT: But I'm supposed to disregard labels
25 anyway, right?

1 MR. SMITH: You sure should.

2 THE COURT: Okay.

3 MR. SMITH: They filed their complaint where they
4 were told to. And why shouldn't we assume that the Second
5 Circuit included that language in the most important part of
6 its decision to avoid this very mess.

7 THE COURT: Let me cut through this. We've been
8 through this last week.

9 MR. SMITH: Yeah.

10 THE COURT: You went to the Florida court in the
11 first instance, which was the phrase from the Second
12 Circuit.

13 MR. SMITH: Correct.

14 THE COURT: And Judge Ryskamp essentially said he
15 was going to defer to this court. So we're beyond that. So
16 let's move on.

17 MR. SMITH: And now it's your decision.

18 THE COURT: Right.

19 MR. SMITH: And our argument is, as you said, it's
20 not a matter of jurisdiction, it's discretion, and you
21 should do what the Second Circuit mandated and let them
22 actually decide it, not simply --

23 THE COURT: He has decided it. You made the
24 argument and he deferred.

25 MR. SMITH: Okay. I don't believe he's decided

1 anything. He's --

2 THE COURT: Well, all right, so we differ on that.
3 But we heard -- you know, we went through this last week.

4 MR. SMITH: The trustee began by saying, that this
5 is not a 12(b)(6) motion, and we all agree it isn't. But I
6 feel like we're dealing with a summary judgment motion at
7 times, because he's saying well, there's not enough facts,
8 and it's not enough that the allegation is based on
9 something Madoff said. Well, that's neither -- that's not
10 where we're here to decide. It wouldn't be relevant to --
11 even a 12(b)(6), maybe a trial, maybe a summary judgment, we
12 can't help the fact that the primary witnesses to what we've
13 alleged happened are Madoff and Mr. Picower who was found
14 dead shortly after Madoff confessed.

15 The last I checked, even convicted felons are
16 allowed to testify under oath. Whether he's credible or not
17 is not to be decided today. He -- the allegations in this
18 complaint are based on things he said. We don't say
19 anywhere in our complaint that they're based on a book.

20 So I don't know where that comes from. This is
21 litigation by guesswork I suppose. It says according to
22 Madoff. And the allegations cannot be discounted simply
23 because he's the source.

24 The trustee says he compared all the allegations
25 from the prior complaints to his original complaint to the

1 ones that are before the Florida court on the motion to
2 amend, and wherever the Goldman one ends up being.

3 Notably, among that -- in that chart, ten pages,
4 at the back of his brief, he doesn't focus on the ones that
5 matter. And when he filed his motion, he didn't focus on
6 the ones that matter. And when we called him out on it, in
7 our opposition, he still hasn't directly addressed them.

8 And they're the allegations in paragraphs 46, 49,
9 and 115 of the Fox's complaint. 46 says that Picower
10 actively engaged in soliciting or encouraging I think is the
11 word customers to invest with Madoff.

12 Notwithstanding that allegation, clear a day in
13 the complaint, the trustee said in his papers, in his reply,
14 and again here today that we haven't alleged anything that
15 has to do with something other than Picower's account. How
16 can you say that? How can you stand here and say that?
17 It's so obvious he knows it's there, and he's been choosing
18 to ignore it. It can't be ignored. It's in there. They
19 have to deal with it.

20 It also shows that there were misrepresentations.
21 You can't actively encourage someone to invest in Madoff
22 when you're Picower. Because Picower knew what was going
23 on. We know that. The trustee's alleged that Picower knew
24 what was going on.

25 So if I know what's going on, which is Madoff's

1 going to take your money and give it to me, or give it to
2 someone else, I'm encouraging you to invest in it, you're
3 lying to them. That's a misrepresentation. You can't have
4 it any other way.

5 THE COURT: What's the misrepresentation?

6 MR. SMITH: Presumably that this is a good idea.
7 You can't encourage someone --

8 THE COURT: There's no allegation that he told
9 anybody that.

10 MR. SMITH: If the allegation --

11 THE COURT: If you're saying they inferred that,
12 assuming they knew, if they inferred it from the fact that
13 he was withdrawing a lot of funds. How do they know what
14 Picower was doing?

15 MR. SMITH: I mean, who know what Picower was
16 doing?

17 THE COURT: The investors.

18 MR. SMITH: I don't know that they did. The
19 allegation is that he encouraged them. You can't --
20 encourage means go ahead, give him your money. He knew what
21 Madoff was going to do with the money, he was going to steal
22 it. So that's a misrepresentation. You can't -- he didn't
23 tell them the truth, that's for sure. We talked about that
24 a second ago.

25 It also -- the point also allegation in paragraph

1 49 that he told Madoff to encourage more people to get -- to
2 expand his base, so there'd be more people to put money into
3 the BLMIS. That has nothing to do with Picower's account.

4 Right? And that's what the Second Circuit --

5 THE COURT: Why would he tell Madoff --

6 MR. SMITH: To find more --

7 THE COURT: -- to get more customers unless it was
8 to make his withdrawals?

9 MR. SMITH: Well, whether that was the reason does
10 not --

11 THE COURT: Why else would it --

12 MR. SMITH: Well, everything has to do with --

13 THE COURT: Well, it's got to be plausible, isn't
14 it?

15 MR. SMITH: It is plausible.

16 THE COURT: I mean, that's a 12(b)(6) standard,
17 but it's got to be plausible.

18 MR. SMITH: It is a 12(b)(6), and really all we
19 had to do to satisfy the Second Circuit was, make
20 allegations that are not duplicative or derivative of the
21 trustee's claims.

22 The trustee has no claims like that. The trustee
23 can't recover any damages for things like that.

24 As to the control person allegations, I adopt the
25 arguments of Mr. Stone, and I would point to paragraph 115

1 of our second amended complaint, which is very similar to
2 the allegations that Mr. Stone highlighted in their
3 complaint, which is that Madoff -- I'm sorry, that Picower
4 not just had the ability to control, but did control aspects
5 of Madoff's operations from account statements to
6 everything.

7 This is not -- I know you don't want to go there,
8 but if you're going to look at this and notwithstanding the
9 mandate, then there's nothing for the Court to decide about
10 the legal sufficiency of these claims. It's much more
11 narrower than that.

12 The corridor for the Court on this application is
13 simply to look at the complaint, and see whether these
14 allegations duplicate something that the trustee has already
15 brought. And they're clearly different.

16 They are not the same thing we pled before. Mr.
17 Murphy said, oh, they've had several chances to do this.
18 No, this is the Fox plaintiffs' second chance, not several.
19 They filed a complaint, it went all the way up to the Second
20 Circuit. The Second Circuit said --

21 THE COURT: Well, I don't have before me a motion
22 to leave to replead, so.

23 MR. SMITH: I'm sorry?

24 THE COURT: I don't have before me a motion to
25 leave to replead so --

1 MR. SMITH: Right.

2 THE COURT: -- it doesn't really matter how many
3 times you've pled this.

4 MR. SMITH: Correct, okay.

5 The motion would be premature in any event, an
6 application for leave to --

7 THE COURT: When would it be timely?

8 MR. SMITH: I suppose if the --

9 THE COURT: After the district court ruled in
10 Florida?

11 MR. SMITH: Yeah, I suppose it would be then.

12 THE COURT: Then it's timely?

13 MR. SMITH: Well, I --

14 THE COURT: After the district court has decided
15 this issue?

16 MR. SMITH: I'm sorry?

17 THE COURT: After the district court has decided
18 the issue?

19 MR. SMITH: That's right.

20 THE COURT: How could I -- how could they then
21 bring a motion here if the district court in Florida decided
22 the same issue?

23 MR. SMITH: Well, they could certainly intervene
24 down there, and put in --

25 THE COURT: But after they've decided --

1 MR. SMITH: No, they could put in their two cents
2 just as the Picowers came up here the other day and filed a
3 motion to --

4 THE COURT: I agree with you they could intervene.

5 MR. SMITH: Right.

6 THE COURT: But why couldn't they also make a
7 motion here to file an adversary proceeding?

8 MR. SMITH: We're back to the mandate.

9 THE COURT: Okay.

10 MR. SMITH: It's -- I also feel like we've lost
11 sight on whose burden this is. You know, the Second Circuit
12 didn't say that we have a burden to go out and do thus and
13 such. We filed a complaint, there it is. It's the
14 trustee's burden to show how it is duplicative.

15 And so far all he has said, talk about conclusory
16 obligations, ah, it's the same old stuff all over again. He
17 doesn't address in his oral argument or in his reply, the
18 very allegations that we say make it different.

19 We put those in there in direct response to what
20 the Second Circuit told us to do. He hasn't met his burden.

21 I would add further that we don't just have a
22 20(a) claim. We have RICO claims, we have other common law
23 claims.

24 THE COURT: But they're all based on the same
25 facts, aren't they?

1 MR. SMITH: Well, he hasn't addressed them at all.
2 He has not said --

3 THE COURT: Well, are they based on the same
4 facts?

5 MR. SMITH: Absolutely not. They're based on the
6 facts in 46, among other things, on the allegations --

7 THE COURT: I'm saying, aren't your RICO claims
8 and your prima facie tort claim based on the same facts as
9 your, essentially your control person claim?

10 MR. SMITH: The -- not all of them. I mean, you
11 don't have to show that he --

12 THE COURT: I'm talking about the elements.

13 MR. SMITH: Yeah, I know, but --

14 THE COURT: Aren't they based on the same factual
15 matter?

16 MR. SMITH: Sure. The facts are the facts.

17 THE COURT: That Picower induced --

18 MR. SMITH: Right.

19 THE COURT: -- Madoff to go out and get more
20 customers and also participated in the preparation of false
21 statements.

22 MR. SMITH: I see what you mean, yes. But whether
23 he --

24 THE COURT: So if those claims are derivative,
25 then all the other claims have to be derivative.

1 MR. SMITH: Right. But remember most of the time
2 that was spent so far, before I got up here, was talking
3 about whether Your Honor should be deciding whether the
4 control was sufficiently pled or not, right?

5 THE COURT: Right.

6 MR. SMITH: That has nothing to do whether -- with
7 whether we've alleged an aiding and abetting a fiduciary
8 duty claim. We don't have to allege any control for that.
9 And the trustee hasn't even spoken to it.

10 THE COURT: But you have to at least have the
11 Second Circuit law, you would have to allege -- knowledge
12 which you've alleged, but actual substantial assistance.

13 MR. SMITH: Correct. But my point is just this,
14 even if you find for whatever standard you apply --

15 THE COURT: And I doubt under the Second Circuit's
16 recent case in Refco that you would survive a motion to
17 dismiss that claim.

18 MR. SMITH: And if this were a motion to dismiss,
19 that might matter, but it doesn't. The point -- the reason
20 I raise it is, even if Your Honor, no matter what standard
21 you decide to apply on that control person claim, you could
22 find that's no good, I don't think it's good enough, Justice
23 Sullivan would've said it's no good. Guess what, we still
24 have the aiding and abetting claims.

25 THE COURT: I guess what you're saying, and this

1 is not a rhetorical question, you're saying, all I do is I
2 look at your complaint, if the underlying claim is a direct
3 -- what looks like a direct claim, a control person claim
4 let's say, that that's the end of the inquiry and then it
5 goes back to Florida to decide whether or not it adequately
6 states a claim.

7 MR. SMITH: That's what the injunction says. It
8 doesn't say anything --

9 THE COURT: Well --

10 MR. SMITH: The injunction doesn't say that the
11 trustee will use his best efforts to prevent former BLMIS
12 customers from filing lousy insufficient claims against the
13 Picowers. It doesn't say that. It says he's only to use
14 his best efforts to stop people from filing claims that are
15 derivative or duplicative of the trustee's claims.

16 He seems to be coming in here and you can tell by
17 the -- I mean, why is he talking about the sufficiency of
18 the claims? It's only because he realizes that these things
19 are not duplicative. If they were duplicative or
20 derivative, he wouldn't bother telling you for pages and
21 pages in his brief that they're no good, that they don't
22 allege enough evidence, as if that's what matters on this
23 motion. That wouldn't even matter on a 12(b)(6).

24 THE COURT: Well, the Second Circuit used the
25 phrase particularized allegations. So that suggests it's

1 got to be something more than conclusory, doesn't it?

2 MR. SMITH: And I would suggest yes, but
3 conclusory in this context would be something like if a
4 plaintiff came up and said, you know, to avoid the
5 derivative and duplicative injunction said, Picower has
6 injured me in ways that are totally different from the
7 claims that the trustee sued him for. That would be
8 conclusory.

9 This -- you know, I don't know how long our
10 complaint is, it goes through all these elements, that's not
11 conclusory. That's the best we can do now. I mean, how
12 often do you -- what more facts do we need? Do we actually
13 -- someone has actually communicated with the primary
14 fraudster, the other one is dead.

15 We've got a motion, a cross-motion pending in
16 Florida for expedited discovery to take Madoff's deposition,
17 and to take the deposition of a representative of the
18 Picower's. Until we get that, at least a ruling on that,
19 how can we be criticized for not providing more details?

20 I mean, it's not as if the evidence of this
21 conspiracy and this fraud is out there for everyone to
22 allege with more particularity than we have. We've done the
23 best we can. This can't be conclusory.

24 Again, Your Honor has a narrow role here, more
25 narrow I submit than a 12(b)(6), and that is, just take a

1 look at this complaint, and is it derivative, is it
2 duplicative. It's not.

3 It's different from the first one that we filed,
4 and therefore, your inquiry is done.

5 THE COURT: Thank you. Yes?

6 MS. HARRIS: Your Honor, may I be heard?

7 THE COURT: On -- who are you and on what?

8 MS. HARRIS: I'm Marcy Harris, Schulte Roth &
9 Zabel, counsel to the Picower parties.

10 THE COURT: Well, you're not a party to this
11 action.

12 MS. HARRIS: We've moved for intervention.

13 THE COURT: But that's a motion a week off.

14 MS. HARRIS: We are -- our interest is directly at
15 issue here.

16 THE COURT: That's certainly relevant to your
17 intervention motion.

18 MS. HARRIS: We are litigating in the Florida
19 courts, and there were statements made about the status of
20 the --

21 THE COURT: All right. I'm happy to hear about
22 the status of the Florida proceeding, because you're
23 involved in that, but in terms of the merits of the
24 trustee's motion, the trustee is the one who will make that
25 argument.

1 MS. HARRIS: Okay. I want to be clear that's what
2 been litigated in Florida is not this issue, whether the
3 trustee's claims or whether the claims in the new complaints
4 are derivative or duplicative.

5 THE COURT: No, I understand that.

6 MS. HARRIS: There has been a motion before Judge
7 Marra that's fully briefed that he hasn't decided yet, it
8 addresses --

9 THE COURT: Is that for the stay? That's for the
10 stay?

11 MS. HARRIS: For the stay and service issues.
12 That's it. We've never briefed the issue. Picowers have
13 never briefed the issue addressed to the duplicative or
14 derivative nature of the claims.

15 THE COURT: Is there a date for the -- the
16 response to your motion?

17 MS. HARRIS: The agreement that we had reached
18 with counsel was that we wouldn't have to respond and put in
19 an answer or move to dismiss until this ruling, this Court
20 had determined --

21 THE COURT: It sounds like a chicken and egg
22 problem.

23 MS. HARRIS: Well, the first I heard sitting here
24 that there was a conference call to the Court last Friday to
25 set up a schedule.

1 THE COURT: I got it.

2 MS. HARRIS: I don't know. Right now, I can tell
3 you we're not aware of any briefing schedule with respect to
4 Judge Marra, and on the Fox side, Ryskamp that the threshold
5 issues have been stayed, there's been no briefing again in
6 that court on the duplicate or derivative issue.

7 THE COURT: Okay. Thank you.

8 MS. HARRIS: Thank you.

9 MR. MURPHY: Your Honor, I'm just going to limit
10 my comments to addressing some of the statements that were
11 made by my colleagues, Mr. Stone and Mr. Smith.

12 Absolutely, you can indeed, Your Honor, issue an
13 injunction when it's duplicative of estate claims. The
14 Second Circuit confirmed it can. We're also not looking to
15 enjoin courts here, we're looking to enjoin parties.

16 With respect to Medsker versus Feingold, Basso,
17 the other party here was an officer and director, and an
18 owner of one of the accounts where all the money went. So
19 again, that's substantively different than what we have
20 here.

21 With respect to our timing, whether it's too
22 early, too late, kind of in a whipsaw position, I think the
23 Court recognized it. We're not going to wait until a
24 Florida district court enters something that's affecting us
25 here. We don't want to be too late.

1 We are not a party to anything down in Florida,
2 and that's why we are here. We are here where we belong
3 before Your Honor.

4 With respect to whether this court or that court
5 should do it, it is this Court's permanent injunction order.
6 This Court should decide it. The charter communication
7 decision is instructive with respect to that.

8 As to where this is better put, they said that
9 some of the people are down in Florida. The main locust of
10 activity here is in New York. If they're proposing to
11 appear in a class action with respect to all the customers,
12 the only that unites all the customers is New York. All the
13 fraud took place here.

14 THE COURT: Well, then you should make -- somebody
15 should make a change of venue motion in Florida. I'm not
16 sure that that -- those factors really weigh into what court
17 is supposed to decide the issue.

18 MR. MURPHY: True, that's fair, Your Honor.

19 THE COURT: Because I'm going to sit here, and
20 Judge Marra is going to sit down there, right?

21 MR. MURPHY: That's true, unless you're going to
22 go on vacation, Your Honor.

23 THE COURT: It's getting too hot in Florida.

24 MR. MURPHY: With respect to -- I feel that, you
25 know, Judge Sullivan kind of created a road map as to why

1 they went wrong. But what I feel is that the class action
2 plaintiffs here simply added the word Picower defendants to
3 where they fell down before.

4 THE COURT: Well, I think I asked you this before,
5 and it's not clear to me. In either of the cases, the Fox
6 case, which went to the Second Circuit, or the Goldman case,
7 were there allegations in the complaints and those times
8 that Picower controlled BLMIS?

9 MR. MURPHY: Yes, yes, there are, Your Honor. And
10 let me just address that specifically because I know that --

11 THE COURT: Okay.

12 MR. MURPHY: -- specific paragraphs were
13 identified by Mr. Stone in the complaint.

14 THE COURT: Well, he's looking at the new
15 complaint, I'm asking about the old complaint. In other
16 words, I'm asking, has the Second Circuit or Judge Sullivan
17 directly or indirectly passed on these allegations?

18 MR. MURPHY: Yes, yes. The answer is yes, Your
19 Honor.

20 I'm not going to reread what Mr. Stone read with
21 respect to paragraph 71, paragraphs 90, paragraph 91, for
22 example, in their own amended complaint.

23 THE COURT: Actually, I'm more interested in the
24 older complaints --

25 MR. MURPHY: Right.

1 THE COURT: -- that have already been before the
2 Court.

3 MR. MURPHY: Let me direct the Court to the older
4 complaint them.

5 THE COURT: All right.

6 MR. MURPHY: What I'm suggesting, this is the
7 complaint that was filed in 2011, Your Honor.

8 THE COURT: Is that in -- which exhibit is that
9 in? Is it in one of the exhibits?

10 MR. MURPHY: Yes, it is, and I don't know what the
11 exhibit number is, but we'll -- I'll get that for Your
12 Honor.

13 THE COURT: This is the Goldman complaint you're
14 talking about?

15 MR. MURPHY: Yes.

16 THE COURT: Let me see if I can find it, because
17 it would be helpful if I could.

18 MR. MURPHY: Sure.

19 THE COURT: Do we have the complaints and these
20 pleadings from the own --

21 MR. MURPHY: Exhibit K to the Murphy declaration,
22 Your Honor.

23 THE COURT: Okay.

24 MR. MURPHY: And you can turn to --

25 THE COURT: We're just trying to find the papers.

1 (Pause)

2 THE COURT: Maybe if you have another copy of it.

3 MR. MURPHY: We're going to get that for Your
4 Honor.

5 THE COURT: Yeah. I can't find it, if you have
6 another one.

7 MR. MURPHY: That's okay, we're going to get it
8 for Your Honor.

9 (Pause)

10 THE COURT: I have a Goldman -- I'm looking for
11 the Goldman complaints.

12 MR. MURPHY: This is the original Goldman
13 complaint.

14 THE COURT: Oh, all right, because I think I may
15 have found it, but thank you.

16 MR. MURPHY: I'm going to start with paragraph --
17 this is the entered 12/13/11, Your Honor.

18 I'm going to start with paragraph number 91, if
19 you want to turn to that.

20 THE COURT: Go ahead.

21 MR. MURPHY: So I'm not going to reread what Mr.
22 Stone said, but with respect to his specific references to
23 paragraph number 71, 90 and 91, as purportedly alleging new
24 control and direction.

25 THE COURT: Uh-huh.

1 MR. MURPHY: I would direct the Court to paragraph
2 91 of the former Goldman complaint, I will read it. "The
3 defendants had the power to influence and control, and did,
4 in fact, directly influence and control the decision-making
5 at BLMIS, the recordkeeping at BLMIS, and the recording of
6 securities transactions at BLMIS."

7 I will go down to paragraph 94, "The defendants
8 either directly or through Picower had direct involvement in
9 the day-to-day operations, recordkeeping, and financial
10 management of BLMIS. The defendants had and employed the
11 power to control and influence actual transactions giving
12 rise to the securities violations alleged herein."

13 Your Honor, I'm going to quote from Judge Sullivan
14 where he says whether -- aside from that, Your Honor, this
15 is -- let me just go back for a second. Those are the same
16 allegations that they had made previously, which were
17 rejected by Judge Sullivan and Judge Lifland. And they are
18 the same, I would submit to you, when you go back and read
19 paragraph 71, 90 and 91 that Mr. Stone referred to, it's all
20 the same thing. There's nothing more here than more
21 inferences and unsupported statements.

22 And he mentioned one other paragraph, paragraph
23 67, it began -- paragraph 67 of the new complaint starts out
24 "as a result of Picower's control." But again, I think if I
25 can take you back, Your Honor, to the earlier kind of levels

1 that I discussed with you, we're starting out with Picower's
2 control of his own accounts, and his withdrawals of his own
3 accounts.

4 And then when you get to the bottom, then we start
5 talking more, far more inferentially. But again, as a
6 result of Picower's control, this is an inference.

7 I'll read to the Court as to why the Court has the
8 power.

9 THE COURT: But didn't the earlier complaint plead
10 that he controlled or had the ability to control the account
11 statements sent to other investors?

12 MR. MURPHY: I think what they have, Your Honor,
13 in paragraph number 2 --

14 THE COURT: This is the old complaint?

15 MR. MURPHY: This is the old complaint. "While
16 Madoff and a few employees operated the Ponzi scheme on a
17 day-to-day basis, they did so under the direction and
18 control of the defendants who participated in the fraud for
19 their own benefit by directing the false -- by directing the
20 creation of false books and records at BLMIS."

21 THE COURT: In their own accounts though?

22 MR. MURPHY: This is in --

23 THE COURT: In the defendant's BLMIS accounts, but
24 the allegation now is that they also indirectly or directly
25 controlled the dissemination of false information to other

1 customers.

2 MR. MURPHY: I would submit to you, Your Honor,
3 that that -- to the extent that there are anything beyond
4 what was here, if any, it's conclusory and is not backed up
5 by any particularized allegations.

6 THE COURT: Okay. So you're saying that I have to
7 determine -- I realize we're getting back to what we
8 started. I have to look at the legal sufficiency of the
9 allegations, as opposed to just saying, well, you know, a
10 control person claim is a direct claim and the Florida court
11 should determine whether it's legally sufficient.

12 MR. MURPHY: If we're going back, Your Honor, I'll
13 go back as well. And that is just --

14 THE COURT: Which is what I did on another case
15 about 20 years ago.

16 MR. MURPHY: I will read you just a quote from
17 Judge Sullivan in his decision, he says, and this is on --
18 this is a West Law cite, Your Honor.

19 THE COURT: What page?

20 MR. MURPHY: *6, 2013 West Law 5511027 *6.

21 "Whether the complaints plead a bona fide control person
22 claim is relevant insofar as it affects whether appellants
23 have plead a non-derivative claim. Appellants cannot invoke
24 the posture of this case to shield their complaints from all
25 scrutiny, since the question before this Court is whether

1 appellants' claims as pleaded in the complaints should be
2 allowed to proceed, despite the injunction and the automatic
3 stay."

4 I submit to Your Honor that Judge Sullivan faced
5 the same issue that you are asking to -- right now, and he
6 found that it was appropriate to go forward and look at
7 these from the perspective of determining whether what we
8 have here is a direct claim that they're alleging that they
9 have, or whether it's a duplicative claim.

10 And really, Your Honor, this Court has the power
11 certainly to determine whether something pleaded here is
12 duplicate and derivative of the trustee's claims.

13 THE COURT: Yeah, but you see if you go to *9, he
14 says, "This examination of the Goldman complaints makes
15 clear that the appellants did not, in fact, claim that the
16 Picower defendants directed BLMIS to make misrepresentations
17 above and beyond what was necessary to document the Picower
18 defendants' false withdrawals."

19 Don't these complaints allege that? I know you
20 say it's conclusory, but don't these complaints purport to
21 allege that?

22 MR. MURPHY: Well, yes, Your Honor, I think that
23 they do purport to do that. And I --

24 THE COURT: So then the next question is, should I
25 decide if they do it sufficiently or should the Florida

1 court decide if they do it sufficiently?

2 MR. MURPHY: I think that you should decide, Your
3 Honor, as to whether they're duplicative and derivative.
4 And I think that you can.

5 I think that what they were presented with here,
6 what Judge Sullivan looked at was what he saw. He said,
7 you've just alleged it as to Mr. Picower's transactions in
8 his own accounts, this is where you failed, you didn't
9 allege it as to all the other customers.

10 Well, that's what they then did on this complaint,
11 Your Honor. They went ahead and they added Picower
12 defendants to everything where they fell short. But you
13 need more than mere conclusory statements, and more than
14 assumptions to just make that. You can't just plug in the
15 missing words to a complaint and make it stand scrutiny.

16 Again, especially in light of the fact that this
17 is not the first time that we're looking at this. This is
18 not a brand new complaint here. As I said before, 75
19 percent of this was already before the prior judges.

20 So we have to look at it in part from that
21 framework, and we need to benefit from those judges'
22 analyses and see to what extent you can apply it here.

23 As to -- there was a reference at some point to e-
24 mails and calls, maybe showing some kind of evidence. I
25 agree with Your Honor, that's not before the Court, it's not

1 in the complaint. But I will note that that kind of
2 evidence, if you will, was promised to Judge Sullivan at
3 oral argument, but that -- it hasn't appeared and it's not
4 in the complaint, and I will stick with what Your Honor
5 said, it's not before you.

6 Your Honor, as to paragraph 46 --

7 THE COURT: Of which complaint?

8 MR. MURPHY: Of the Fox Marshall complaint. There
9 you go, thanks.

10 My colleague Mr. Smith eluded to paragraph 46 as
11 showing some strength that they've pleaded independent
12 claims. I would direct the Court, though, to just as a
13 comparison, paragraph 45 directly above it, talks about very
14 specific activity.

15 THE COURT: Well, there's no question they're very
16 specific in terms of --

17 MR. MURPHY: What Picower did.

18 THE COURT: -- what Picower did with his own
19 accounts.

20 MR. MURPHY: Correct.

21 THE COURT: I don't think anybody is arguing that,
22 and this is less specific.

23 MR. MURPHY: Okay. So I'm going to -- what
24 immediately follows then is the very generalized kind of
25 comment. But again, we start off in paragraph number 46 of

1 the Fox amended complaint with according to Madoff, Picower
2 knew that in order to generate the enormous paper profits in
3 their accounts, BLMIS would have to steal money from
4 customers. According to Madoff, Picower fully and knowingly
5 participated in the fraud, that BLMIS perpetrated on
6 customers and actively encouraged people to enter into
7 investment advisory agreements.

8 Again, these allegations that Picower fully and
9 knowingly participated in the fraud had been made before
10 especially by the Goldman plaintiffs. And not necessarily
11 -- that was rejected.

12 THE COURT: Did Judge Sullivan deal with that?
13 Well, where were those allegations in the Goldman complaint?

14 MR. MURPHY: They were in, Your Honor, let me just
15 see. Your Honor, paragraph 55. Paragraph 55 at the bottom,
16 at the very end, "at all relevant times, Picower and the
17 Picower defendants knew that the withdrawals could only be
18 property of other BLMIS customers, including plaintiff and
19 the other class members."

20 Paragraph 44, "in interviews with author, Diana
21 Henriques, Madoff stated that Jeffrey Picower knew the
22 existence of a scheme, and that Jeffrey Picower was taking
23 fraudulent profits from the BLMIS customer accounts."

24 Again, I would lead the Court back to paragraphs
25 91 and 94 as an example. Again, they were saying, "the

1 defendants had the power to influence and control and did,
2 in fact, influence and control the decision-making at BLMIS,
3 the recordkeeping at BLMIS, and the recording of securities
4 transactions at BLMIS."

5 With respect to paragraph 46 again, Your Honor, on
6 the Fox complaint at least, when we talk about according to
7 Madoff, that he fully participated. Again, the other courts
8 have seen that allegation before, but specifically
9 addressing this one paragraph, Mr. Smith eluded to, if you
10 read the paragraph as a whole, it's merely an additional
11 inference based on the same allegations that were previously
12 made regarding Mr. Picower's activities in his own accounts.

13 I've already commented on what I think about Mr.
14 Madoff's statements.

15 THE COURT: Well, I'm not going to judge -- you
16 know, I'm not going to judge Mr. Madoff's credibility.

17 MR. MURPHY: Sure.

18 THE COURT: The question is whether they have
19 alleged a claim.

20 MR. MURPHY: Well, there's absolutely no
21 specificity here alleged, Your Honor. I mean, there's no
22 facts provided. Who did he encourage, when, how, there's no
23 allegation that any of the customers, the plaintiffs here
24 received any of that encouragement. Nothing.

25 And they purport to represent that they're going

1 to represent all customers here, and they represent quite a
2 few, over a couple of hundred even now in other sides of
3 this case, or at least well over 150.

4 But, you know, if you contrast the two, the
5 specific and not specific, you see where they're falling
6 short, but they can't be more specific here, because they
7 don't have particularization.

8 We're not sure where that information comes from,
9 by the way, Mr. Smith alleged -- said not sure where it
10 comes from.

11 THE COURT: I guess that will be the subject of
12 discovery.

13 MR. MURPHY: Discovery, yeah, and I mean, they
14 haven't deposed Mr. Madoff yet, so you know.

15 THE COURT: Has he given any depositions?

16 MR. MURPHY: Not that I know of, Your Honor. I
17 think that's it, Your Honor. If I could just have a moment
18 with Picower's counsel for --

19 THE COURT: Sure.

20 (Pause)

21 MR. MURPHY: Your Honor, after consulting Mr.
22 Picower's counsel, I will note that as to the first filed
23 issue, the trustee was the first filed here. We brought the
24 complaint. We had alleged that Mr. Picower knew or should
25 have known about the fraud and the activities going on in

1 those accounts. In Goldman, one in 2011, and Goldman too in
2 2014.

3 THE COURT: Yeah, but those are different cases.

4 MR. MURPHY: Different cases, right, Your Honor,
5 those are --

6 THE COURT: The issue you're raising now is
7 whether the Picower and Fox complaints violate the automatic
8 stay and the injunction, and that wasn't something that was
9 raised when you sued Mr. Picower.

10 MR. MURPHY: Fair enough, Your Honor.

11 THE COURT: All right.

12 MR. MURPHY: Thank you.

13 THE COURT: Thank you. I'll reserve decision, no
14 surreplies. Thank you.

15 (Proceedings concluded at 11:35 AM)

16 * * * * *

CERTIFICATION

I, Sheila G. Orms, certify that the foregoing is a
correct transcript from the official electronic sound
recording of the proceedings in the above-entitled matter.

Dated: May 7, 2014

Signature of Approved Transcriber

Veritext

330 Old Country Road

Suite 300

Mineola, NY 11501